



Citation: *SE v Canada Employment Insurance Commission*, 2022 SST 349

**Social Security Tribunal of Canada
General Division – Employment Insurance Section**

Decision

Appellant: S. E.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (451394) dated January 21, 2022 (issued by Service Canada)

Tribunal member: Amanda Pezzutto
Type of hearing: Teleconference
Hearing date: March 15, 2022
Hearing participants: Appellant
Appellant's representative
Decision date: March 28, 2022
File number: GE-22-486

Decision

[1] S. E. is the Claimant. The Canada Employment Insurance Commission (Commission) decided that he wasn't available for work. So, the Commission refused to pay Employment Insurance (EI) benefits. The Claimant is appealing this decision to the Social Security Tribunal (Tribunal).

[2] I am dismissing the Claimant's appeal. I find that the Claimant has proven that he was available for work. This means he isn't entitled to EI benefits.

Overview

[3] The Claimant worked as a school bus driver. He left his job after the employer made significant changes to his duties. He applied for EI benefits. The Commission decided that he had just cause for quitting his job. But the Commission decided that he hadn't proven that he was available for work starting November 1, 2021. So, the Commission refused to pay EI benefits.

[4] The Commission argues that the Claimant hasn't proven that he was available for work. The Commission says he isn't trying to find a job and he put too many restrictions on the kind of work he would accept.

[5] The Claimant disagrees. He says that he was willing to work because he would have kept working if the employer hadn't changed his job. He says he was trying to find a job that was similar to his old job.

Issue

[6] Was the Claimant available for work from November 1, 2021? Is he available for work now?

Analysis

[7] There are two different sections of the law that say you have to prove that you are available for work.

[8] First, the *Employment Insurance Act* (Act) says that you have to prove that you are making “reasonable and customary efforts” to find a suitable job.¹ The *Employment Insurance Regulations* (Regulations) give criteria that help explain what “reasonable and customary efforts” means.²

[9] Second, the Act says that you have to prove that you are “capable of and available for work” but aren’t able to find a suitable job.³ Case law gives three things a claimant has to prove to show that they are “available” in this sense.⁴

[10] You have to prove that you are available for work on a balance of probabilities. This means that you have to prove that it is more likely than not that you are available for work.

[11] The Commission says it used both sections of the law to refuse EI benefits. So, I will look at both sections of the law when I decide if the Claimant has proven his availability for work. But first, I am going to look at what kind of work is suitable. This is because the Commission has made some arguments about whether the Claimant is looking for suitable work.

What kind of work is suitable work for the Claimant?

[12] When you are looking for work, you have to prove that you are looking for work that is suitable. A job is suitable if it is the kind of work that matches your health and physical ability. A suitable job should have hours of work that match your family needs or your religious beliefs. A suitable job should not make you do things that go against your religious or moral beliefs.⁵

[13] The Commission says the Claimant isn’t looking for suitable work. This is because he told the Commission that he didn’t know what kind of work he could do.

¹ See section 50(8) of the *Employment Insurance Act* (Act).

² See section 9.001 of the *Employment Insurance Regulations* (Regulations).

³ See section 18(1)(a) of the Act.

⁴ See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

⁵ Section 9.002 of the *Employment Insurance Regulations*.

[14] But at the hearing, the Claimant said that part-time work as a bus driver is suitable for him. He says that it is suitable because of his age and because of his past work experience in this field.

[15] The Claimant hasn't given me any medical evidence showing me that part-time work is the only kind of work that is suitable for him. But I note that his past work history shows that he worked as a part-time bus driver before.

[16] So I agree with the Claimant. I agree that part-time work as a bus driver is suitable work.

Reasonable and customary efforts to find a job⁶

[17] The law explains how I must look at the Claimant's job search efforts and decide if he has proven that his efforts were "reasonable and customary." I have to look at whether he made sustained efforts. This means he has to show that he kept trying to find a suitable job.

[18] The law gives examples of which kinds of job search activities are reasonable and customary. For instance, I can look at whether the Claimant was doing the following kinds of job search activities:

- Assessing employment opportunities
- Using online job banks
- Contacting employers who may be hiring
- Applying for jobs

⁶ I acknowledge that the Appeal Division (AD) has addressed this part of the law. The AD says that I must consider the evidence and be certain that the Commission actually used this part of the law to assess the Claimant's availability. For instance, see *LD v Canada Employment Insurance Commission*, 2020 SST 688. In this case, I will include this section in my decision. This is because the Commission asked the Claimant about his job search efforts several times.

- Attending job interviews⁷

[19] This isn't the entire list of job search activities listed in the law. There are other examples too.

[20] The Commission says the Claimant wasn't trying to find a job. So, the Commission says he hasn't proven that he was doing enough to try to find a job.

[21] The Claimant disagrees. He says that he was trying to find a job.

[22] There is conflicting information in the appeal file. This means I have to look at all of the evidence and make a decision on the balance of probabilities.⁸ Which of the Claimant's statements about his job search efforts is most likely to be true?

[23] The Claimant spoke to Commission agents about his job search efforts several times. In his first conversation with a Commission agent, on November 22, 2021, the Claimant told the Commission that he hadn't applied for any jobs since he quit his job. He said he didn't know what kind of work he could do, so he hadn't been looking for work.

[24] The same Commission agent spoke to the Claimant again on November 30, 2021. During this conversation, the agent told the Claimant that he wasn't entitled to EI benefits because he wasn't trying to find a job. The Claimant told the Commission that he thought the Commission was punishing him for telling the truth. He told the Commission agent that he could "lie and tell [the Commission] that he is looking for full-time work."

[25] After the Claimant asked for a reconsideration, he spoke to another Commission agent on January 21, 2022. During this conversation, the Claimant told the agent that he still wasn't sure what kind of work he could do. He told the agent that he hadn't applied for any jobs yet and that he hadn't been looking for work.

⁷ See section 9.001 of the Regulations.

⁸ The Federal Court of Appeal says that the standard of proof is the balance of probabilities for employment insurance matters in its decision *Canada (Attorney General) v. Corner*, A-18-93.

[26] But at the hearing, the Claimant made very different statements about his job search efforts. At the hearing, he told me that he started looking for work early in November 2021. He said he looked for work by looking at online job postings. He said he only stopped looking for work once the Commission agents told him he wasn't entitled to EI benefits.

[27] I asked the Claimant to explain the contradiction between the things he said to the Commission agents and the things he told me at the hearing. The Claimant's son told me that the Claimant was confused because the agent asked too many questions. He said the Claimant was confused about his responsibilities.

[28] I don't think this is a credible explanation. The Commission notes don't include any suggestion that the Claimant was confused by the agents' questions. In fact, the Claimant's statement that he could lie to the Commission about his job search intentions shows me that the Claimant understood what the Commission expected of him. I also note that the Claimant made his first statements to the Commission spontaneously and immediately after he left his job. In contrast, the Claimant's statements at the hearing were several months after he left his job, and after the Commission had already denied benefits twice.

[29] So, I will not give any weight to the things the Claimant said at the hearing about his job search efforts. I think his statements to the Commission about his job search efforts are more likely to be true.

[30] The Claimant told the Commission that he hadn't applied for any jobs. He said he wasn't sure what kind of work he could do. He said he hadn't started looking for work. I think this shows that the Claimant hasn't proven that he was making reasonable and customary efforts to find a job.

Capable of and available for work

[31] The second part of the law that talks about availability says that you have to prove that you are capable of and available for work but unable to find a suitable job.

[32] Case law gives me three factors to consider when I make a decision about availability for work. This means I have to make a decision about each one of the following factors:

1. You must show that you wanted to get back to work as soon as someone offered you a suitable job. Your attitude and actions should show that you wanted to get back to work as soon as you could;
2. You must show that you made reasonable efforts to find a suitable job;
3. You shouldn't have limits, or personal conditions, that could have prevented you from finding a job. If you did set any limits on your job search, you have to show that the limits were reasonable.⁹

– **Wanting to go back to work**

[33] At the hearing, the Claimant said that he wanted to go back to work. He said he would have kept working if the employer hadn't changed his job.

[34] But the case law says I have to look at the Claimant's attitude and actions to make my decision.¹⁰ What do his attitude and actions show me about his desire to return to work?

[35] The Claimant agrees that his employer offered him another school bus driving job. The Claimant refused this job because it wasn't similar enough to his old job. He told the Commission that he hadn't been looking for work because he didn't know what kind of work he could do.

⁹ In *Faucher v. Canada Employment and Immigration Commission*, A-56-96, the Federal Court of Appeal says that you prove availability by showing a desire to return to work as soon as a suitable employment is offered; expressing your desire to return to work by making efforts to find a suitable employment; and not setting any personal conditions that could unduly limit your chances of returning to the labour market. In *Canada (Attorney General) v. Whiffen*, A-1472-92, the Federal Court of Appeal says that claimants show a desire to return to work through their attitude and conduct. They must make reasonable efforts to find a job, and any restrictions on their job search should be reasonable, considering their circumstances. I have paraphrased the principles described in these decisions in plain language.

¹⁰ *Canada (Attorney General) v. Whiffen*, A-1472-92

[36] I have already explained why I think the Claimant's statements to the Commission are more reliable than his statements at the hearing. For the same reasons, I don't give very much weight to his statements at the hearing about his desire to return to work. Instead, I choose to rely on what his attitude and actions show me about his desire to return to work.

[37] So, I find that the Claimant hasn't proven that he had a desire to return to work as soon as a suitable job was available. This is because he refused other work and a bus driver and he didn't try to find a job.

– **Making efforts to find a suitable job**

[38] I have to use the list of job search activities from the Regulations when I look at the first part of the law. Now that I am looking at the Claimant's availability for work under the second part of the law, I don't have to use the list of job search activities. But, I think the list of job search activities are useful when I look at this second factor

[39] I have already decided that the Claimant wasn't making reasonable and customary efforts to find a job. He told the Commission that he hadn't been looking for work. He also said he hadn't applied for any jobs. I think the things he said to the Commission are more credible than his statements at the hearing. This is because he made these statements to the Commission spontaneously and more than once.

[40] To get EI benefits, you have to be looking for a job.¹¹ This means you have to have a reasonable job search. I find that the Claimant wasn't trying to find a job, and so I find that his job search efforts aren't enough to meet the requirements of this factor.

– **Unduly limiting chances of going back to work**

[41] The Commission says the Claimant set too many personal conditions on his job search because he was only looking for part-time work.

¹¹ *Canada (Attorney General) v Cornelissen-O'Neill*, A-652-93.

[42] The Claimant agrees that he is looking for part-time work, but he says this isn't a condition that would unduly limit his chances of finding a job.

[43] I have already decided that part-time work as a bus driver is suitable work for the Claimant. But I find that, on top of this requirement, the Claimant set too many personal conditions. I find that his personal conditions made it too difficult to find a job.

[44] At the hearing, the Claimant described the kind of work he wanted. He said he wanted to find a job similar to his old job. He wanted a part-time job driving a bus. He wanted a similar wage to his old job – around \$120 a day. At the hearing, he didn't talk about any other restrictions that he had about routes or number of passengers. But I note that he told the Commission that his employer wanted him to drive five children and he felt that this was too many passengers. So I think it is likely that the Claimant also had some conditions about the number of passengers he wanted to drive.

[45] Neither the Claimant nor the Commission have given me evidence about whether the Claimant's personal conditions were reasonable, given the job market in his area. But at the hearing, I asked the Claimant if he had identified jobs in his area that met all of his conditions. The Claimant said he hadn't yet seen a single job posting that met all of his conditions since he stopped working.

[46] The Claimant's hearing was March 15, 2022. He stopped working in early November 2021. So this means that, from the beginning of November 2021 to March 15, 2022 – a period of more than four months – there were no jobs that matched the Claimant's personal conditions in his area.

[47] This makes me think that the Claimant's personal conditions have made it too difficult for him to find a job. This is because his own evidence shows me that there simply aren't any jobs that match his personal conditions in his area.

[48] So, on a balance of probabilities, I find it likely that the Claimant's personal conditions have unduly limited his chances of returning to the labour market.

– **So, was the Claimant capable of and available for work?**

[49] I find that the Claimant hasn't shown that he had a desire to return to work. He hasn't been making reasonable efforts to find a job. He set personal conditions that unduly limited his chances of returning to the labour market. So, I find that the Claimant hasn't proven that he was capable of and available for work, but unable to find a suitable job, starting November 1, 2021.

[50] At the hearing, the Claimant argued that that he would start an active job search once he starts receiving EI benefits. He asked me to decide that he was available for work and entitled to EI benefits from the date of the hearing. But it is up to the Claimant to prove that he is entitled to EI benefits. For each day he can prove that he was available for work, he can make a claim for EI benefits.

[51] In other words, the Claimant has to prove that he is available for work first, and then he can claim EI benefits. He hasn't given me enough information to prove that he is available for work, and so he hasn't proven that he is entitled to EI benefits.

[52] If the Claimant has new information about his availability for work (for example, if he starts keeping a job search record) he can provide that information to the Commission and ask the Commission to start paying EI benefits.

[53] But for now, based on the evidence before me, the Claimant hasn't proven that he is available for work.

Conclusion

[54] I am dismissing the Claimant's appeal. He hasn't proven that he was available for work. So, I find that he isn't entitled to EI benefits starting November 1, 2021.

Amanda Pezzutto
Member, General Division – Employment Insurance Section